RECORD
AND
BRIEFS

(2)

Supreme Court, U.S.
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No. 10-1226

In the Supreme Court of the United States

JOSE ANTONIO RODRIGUEZ,
Petitioner,

v.

FEDEX FREIGHT EAST, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Court of Appeal's Opinion affirming the District Court does not conflict with a decision of this Court or a Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Court of Appeal's Opinion affirming the District Court does not implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE PURSUANT TO SUPREME COURT RULE 29.6

Respondent FedEx Freight East, Incorporated is a subsidiary/affiliate of FedEx Corporation.

FedEx Corporation is a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome of the appeal.

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I. INTRODUCTION

The present diversity case involves a one-count state law discrimination claim for failure to promote, where, by his own admission, Petitioner purportedly lost less than $5,000 in economic damages. (Resp. Appx. 7b-10b, 14b-15b). The matter was tried before a jury after the district court provided customary introductory instructions, including a general prohibition against investigating the facts of the case, as well as substantive instructions based on the Michigan Model Jury Instructions. The case involved no federal questions or issues whatsoever. While Petitioner now argues that the district court should have given a specific instruction prohibiting internet use by jurors, no model state or federal court instruction, nor any requirement to provide such instruction, existed at the time of trial. The fact that one juror purportedly read about the lawyers on the internet also does not warrant review by this Court. Nor does the fact that the district court denied an evidentiary hearing regarding Juror #4's alleged conduct warrant such review.

Petitioner provides no compelling reason for this Court to grant his Petition for Writ of Certiorari ("Petition") because there is none. There is no conflict between the Circuits, nor has the Sixth Circuit Court of Appeals ("Court of Appeals") decided an important question of federal law that conflicts with, or which has not been settled by, this Court. While the inapposite and *post-hoc* cases and commentary from various journals and news articles cited by Petitioner regarding potential juror internet use may serve useful for a model rules committee, they provide no legal

basis for review by this Court.[1] Accordingly, the Petition should be denied.

II. STATEMENT OF THE CASE/ CORRECTION OF PERTINENT FACTS

On December 2, 2003, Petitioner filed a multi-count Complaint alleging exclusively state-laws claims against Respondent in a Michigan circuit court, which was removed on diversity grounds. (District Court Case No. 2:04-cv-70021, R. 1, Notice of Removal with attached Complaint). Petitioner subsequently filed for bankruptcy and this case became part of the bankruptcy estate. (District Court Case No. 2:04-cv-70021, R. 24, Referral Order). On December 1, 2005, the bankruptcy court granted Respondent summary judgment on all counts. (District Court Case No. 2:08-cv-10637, R. 2, Objections to Bankruptcy Court's Order After Removal, Ex. A, Initial Bankruptcy Court Opinion). On May 30, 2006, the district court affirmed the bankruptcy court. (*Id.*, Ex. B, Order Affirming Bankruptcy Court).

In July 2006, Petitioner filed his first appeal. On June 27, 2007, the Court of Appeals issued its opinion affirming the district court on all counts but one. It remanded the matter solely to determine whether Respondent would have refused to promote Petitioner even absent an allegedly discriminatory comment regarding his accent. *In Re Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001, 1009-10 (6th Cir. 2007).

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[1] All of the journal and internet articles, and internet-related cases, post-date the trial in this case.

On June 23, 2008, the district court began a five-day jury trial as to Petitioner's failure to promote claim on which he was limited to approximately $3,500.00 to $5,000.00 in economic damages.[2] (Resp. Appx. 7b-10b, 14b-15b). Prior to trial, the district court specifically informed the parties (both on the record and in chambers) that it would not read all of their proposed instructions and statements. (R. 68, Trial Trans. Vol. 1A, p. 5:19-6:4). After impaneling the jury, the district court provided preliminary jury instructions. It did not "refuse" to give the parties' proposed instruction regarding use of the internet, as Petitioner suggests, but instead read the following alternative charge:

> Secondly, do not read or listen to anything about the case in any way. . . . Third, do not try to do any research or make any investigation about the case on your own. . . .
>
> (Resp. Appx. 3b (emphasis supplied)); *see also* Pet. Brf. p. 14.

The instruction, as provided, adequately addressed the parties' concerns about researching the case – on the internet or otherwise. At no time did Petitioner object to the instruction that was given, nor to the fact that the parties' proposed instruction was not provided. Petitioner's claim that the district court "did

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[2] The Court of Appeals affirmed the district court's finding that Petitioner had voluntarily resigned from Respondent and was not constructively discharged. Thus, he was only entitled to recover minimal economic damages (i.e., from the date of the alleged promotion until the date he resigned). *In Re Rodriguez*, 487 F.3d at 1009.

not even give the parties an opportunity to object," pursuant to Fed.R. Civ. P. 51(b)(1)(2) or otherwise, is patently false. (Pet. Brf. pp. 3, 14). Petitioner had ample opportunity to object and, in fact, made multiple objections when the district court refused to read several of his other proposed instructions. (R. 75, Trial Trans. Vol. 5B).

At the close of proofs, the district court instructed the jury as to what "evidence" it could consider in reaching a verdict:

> The evidence that you are to consider consists of testimony of witnesses and exhibits that are offered and received. . . . ***The lawyers' statements and arguments are not evidence.*** They are only meant to help you understand the evidence and each side's legal theories.
>
> * * *
>
> You have a right to consider all of the evidence in light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence that seems reasonable and probable. ***However, if you have personal knowledge of any particular fact in this case, such knowledge should not be used as evidence.***

[R. 75, Trial Trans. Vol. 5B-1, Jury Charge, pp. 12:16-14:6]. The district court further instructed the jury to disregard anything heard outside of the courtroom and to decide the case solely on evidence presented in court. (R. 68, Trial Trans. Vol. 1A, p. 53:17-20).

At closing, Petitioner's counsel stated he was a former UAW member. (R.68, Trial Trans. Vol. 5A). He also made repeated references to Respondent having the funds to hire a large law firm, and that lead counsel worked for a large defense firm. (Resp. Appx. 12b-22b). In response, Respondent's counsel traded biographies by interjecting one comment about her background. Petitioner did not object.

On June 27, 2008, the jury no-caused Petitioner entering a verdict in Respondent's favor. (R. 45, Verdict). The district court polled the jury after the verdict and discharged the jurors. (R. 75, Trial Trans. Vol. 5B-1, Verdict, pp. 30:23-32:10). Petitioner never requested further inquiry, nor was there cause to do so. Yet, Petitioner's counsel approached jurors before they could leave the courthouse. (R. 63, Rodriguez's Motion for Reconsideration, Ex. 1, Martin Aff., p. 2). He then engaged in *ex parte* and wholly inappropriate communications. (R. 48, Motion for New Trial, Ex. 1, Martin Aff., pp. 1-2). Absent any notice to the district court or opposing counsel, Petitioner's counsel conducted additional, searching inquiries with at least two jurors. In doing so, one juror allegedly made a fleeting comment about reviewing biographical information concerning the ***lawyers*** on the internet. Petitioner's counsel took it upon himself to use that comment as license to conduct further juror questioning – running afoul of Fed. R. Evid. 606(b). At no time did Petitioner bring such contact to the district court's or opposing counsels' attention. Petitioner's communications with jurors continued for some time. Over a period of months, he obtained multiple affidavits from at least two jurors, including Juror #4

(which were drafted by his counsel, appearing on firm letterhead).[3]

Thereafter, Petitioner engaged in extensive post-trial motion practice based on misrepresentations, improper juror contact, and unseemly attacks against opposing counsel, the court reporter, and the district judge. (R. 48-79). Petitioner claimed he was entitled to a new trial because Juror #4 purportedly read about the attorneys on the internet. However, Petitioner presented no evidence Juror #4's research regarding the attorneys affected the verdict. The affidavits submitted stated only that Juror #4 read about *the attorneys*. (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.). There was no evidence he reviewed anything substantive about the case or that he shared the information he purportedly reviewed.[4] *Id.* Moreover, there was absolutely no indication extrinsic evidence made its way into deliberations. *Id.*

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[3] (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff. (dated July 7, 2008); R. 50, Juror #5 Aff. (undated); R. 70, Motion for Reconsideration, Ex. 1, Juror #2 Aff. (dated Nov. 21, 2008); Ex. 2 Juror #5 Aff. (dated Nov. 26, 2008)).

[4] Other than sheer speculation, Petitioner has never presented any evidence that Juror #4 reviewed the underlying opinion from Petitioner's first appeal. (Pet. Brf. p. 1). Assuming *arguendo* that he had, there still is no evidence that doing so would have prejudiced Petitioner or denied him a fair trial. To the contrary, any review of the opinion would likely have prejudiced Respondent, as the Court of Appeals remanded the failure to promote claim, indicating that an alleged comment about Petitioner's accent could be viewed as direct evidence of discrimination. *See In Re Rodriguez*, 487 F.3d at 1009-1010.

The district court denied Petitioner's requests for a mistrial, judgment notwithstanding the verdict, and for a new trial, as they pertained to the alleged juror misconduct for several reasons: (1) the submitted affidavits were insufficient on their face to warrant a new trial; (2) Petitioner's allegations of bias were pure conjecture; and (3) Petitioner's post-verdict, juror contact was improper. (R. 62, Order Denying Motion for New Trial, pp. 3-8; R. 64, Order Denying Motion for Reconsideration, pp. 1-3). The district court noted that "Counsel had the opportunity to obtain a 'perspective on the verdict' from jurors in the presence of the court by joining the court in talking to the jurors in the jury room immediately after trial." (R. 62, p. 7). Because Petitioner had absolutely no grounds for contacting jurors – and did so without providing any notice to the court or opposing counsel – the district court admonished him for engaging in post-verdict examinations that "went beyond idle curiosity and [were] improper." (R. 62, p. 8). The district court also found that counsel for Petitioner's attestations that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggested impermissible questioning in violation of Fed. R. Evid. 606(b). *Id.*, pp. 7-8 (*quoting* R. 48, Ex. 1, Martin Aff. ¶ 2) (*see similar attestations at* R. 48, Ex. 2, Juror #2 Aff., ¶ 4 and R. 50, Juror #5 Aff., ¶ 4). When Petitioner moved for reconsideration based on these same affidavits, the district court again admonished him, holding that "[c]ounsel's improper questioning of the jurors cannot be condoned." (R. 64, Order Denying Motion for Reconsideration, p. 3).

Further, the alleged information reviewed was about the lawyers – not the case. The district court pointed out "[a]ny [alleged] undue bias a particular

juror held against attorneys who represent minority employees or large corporations was the proper subject of voir dire." (R. 62, Order Denying Motion for New Trial, pp. 6-7) (citing, *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981)). In doing so, the district court properly distinguished between acquiring information regarding the facts of the case, as opposed to such general information. *See United States v. Gonzales*, 227 F.3d 520 (6th Cir. 2000) (reversing an order for new trial based on juror's alleged knowledge about defendant's counsel); *Price v. Kramer*, 200 F.3d 1237, 1255 (9th Cir. 2000) (jurors' revelation of past experiences with police was "general" in nature, and different than the type of information courts proscribe – such as extrinsic experiments related to the case).

The district court also determined that Petitioner's untimely Rule 51(b) argument was meritless. It was not required to give a proposed jury instruction even if agreed to by both parties.[5] Further, as noted by the district court, the Sixth Circuit has not adopted any pattern jury instruction regarding internet use. (R. 73, Order re: Motion to Correct Record, p. 2). Additionally, Michigan's recently-adopted MI Civ. J.I. 2.06, concerning juror computer use, ***did not become effective until September 1, 2009***, well over a year after the trial in this case ended. Even if the Michigan Supreme Court had adopted such an instruction prior to the trial date, however, not giving such an

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[5] Petitioner's Rule 51(b) arguments are baseless because the district court specifically told the parties (both on the record and in chambers) that it would not read all of their proposed instructions and statements. (R. 68, Trial Trans. Vol. 1A, p. 5:19-6:4).

instruction in federal court was still within the district court's discretion.[6]

On September 30, 2008, Petitioner filed a Notice of Appeal. Petitioner again claimed he was entitled to a new trial because Juror #4 purportedly read about the attorneys on the internet and because the district court denied an evidentiary hearing. In an order and opinion dated November 15, 2010, the Court of Appeals reviewed Petitioner's multiple claims and affirmed the district court, finding that it had thoroughly and meticulously analyzed the relevant issues in the district court's 19 page opinion denying the Petitioner's request for a new trial.[7] (Pet. Appx. 2a). Contrary to Petitioner's suggestion, the condensed opinion does not mean the Court of Appeals did not analyze the issues regarding the proposed internet jury instruction or the post-trial evidentiary hearing. (Pet. Brf. p. 17). Quite simply, the Court of Appeals noted that in light of the fact the district court set out the applicable law and correctly applied the law to the facts in the case, it found that a full opinion would serve no useful purpose. (*Id.* at 2a, 4a). On December 9, 2010, Petitioner sought an *en banc* review. The entire bench found Petitioner's arguments less than compelling and denied the request. (Pet. Appx. 39a-40a).

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[6] Because there is now a model state jury instruction regarding internet use, even if this Court were inclined to resolve an issue of state law (which it is without authority to do), there is nothing to correct.

[7] The Court of Appeals also indicated it was not empowered to create a model jury instruction. (Pet. Appx. 4a).

III. REASONS FOR DENYING THE PETITION

Petitioner portrays his case as one involving novel, state-of the-art, issues by interjecting speculative arguments about Juror #4, and the internet and its potential usage by jurors, in a desperate attempt to obtain review by this Court. However, his portrayal bears no resemblance to the run-of-the-mill, low-tech, employment discrimination case actually litigated and decided by the courts below. None of the "facts" described in the post-trial journals and publications, or the few *post-hoc* cases relied upon by Petitioner, occurred in the case below. There were no "tweets", facebook messages, e-mail sharing or Google searches regarding the facts of the case or otherwise. Instead, one juror allegedly read background information about *the attorneys* – information which was voluntarily shared with the jurors by Petitioner's counsel during the trial.

Only two issues are relevant to this Petition – whether the district court erred by not reading a proposed instruction that prohibited internet use by the jurors and whether the district court erred by not granting an evidentiary hearing after it was purportedly discovered that Juror #4 read about the parties' attorneys on the internet. The decisions of the district court and Court of Appeals regarding these two narrow issues do not conflict with a ruling of any other Circuit or this Court, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not demonstrated a "compelling reason" for the Petition to be granted. S. Ct. R. 10(a)-(c). Nevertheless, the lower courts ruled appropriately on both issues raised by Petitioner.

1. The District Court Properly Instructed the Jury as to Conducting Research About the Case and Disregarding Extraneous Information

Here, the district court instructed the jury to consider only witness testimony and exhibits received into evidence, and to ***disregard any personal knowledge of any particular fact in this case.*** (R. 75, Trial Trans. Vol. 5B-1, Jury Charge, pp. 12:9-18, 14:4-6; *see also*, R. 68; Trial Trans. Vol. 1A, p. 53:17-20 (instructing the jury to disregard anything heard outside of courtroom and to decide the case solely on evidence presented in court)).

The district court also provided an instruction that jurors refrain from conducting research about the case, which stated:

> Secondly, do not read or listen to anything about **the case** in any way. . . . Third, do not try to do any research or make any investigation about **the case** on your own. . . .

(Resp. Appx. 3b (emphasis supplied)).

Even though Petitioner's proposed jury instruction was not read, the above instructions adequately addressed his concerns regarding internet research, as it encompassed *all* research regarding the case. There is no legal support for Petitioner's contention that the district court was required to provide a specific "internet use" instruction. Moreover, the district court could not have contemplated giving any *post-hoc* model instruction which *did not exist* at that time of trial.

2. Petitioner's Juror-Misconduct Claim Does Not Warrant a New Trial

The district court correctly denied Petitioner's requests for a mistrial, judgment notwithstanding the verdict, and for a new trial concerning Petitioner's allegations of juror misconduct for several reasons: (1) the submitted affidavits were insufficient on their face to warrant a new trial; (2) Petitioner's allegations of bias were pure conjecture; and (3) Petitioner's post-verdict, juror contact was improper. (R. 62, Order Denying Motion for New Trial, pp. 3-8; R. 64, Order Denying Motion for Reconsideration, pp. 1-3).

Not every trial irregularity invalidates a verdict. *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 1570-71, 36 L.Ed.2d 208 (1973) (litigant "is entitled to a fair trial but not a perfect one"). And vague allegations of juror misconduct do not necessitate a new trial. *United States v. Wayne*, 388 F.2d 535, 537 (6th Cir. 2004). Rather, a new trial ***only*** is warranted where the movant demonstrates by a preponderance of the evidence that extraneous influences so prejudiced jury considerations that he was denied a fair trial and, absent such extraneous influences, the outcome would have been different. *Gault v. Poor Sisters of St. Frances Seraph of the Perpetual Adoration, Inc.*, 375 F.2d 539, 549-551 (6th Cir. 1967); *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1131 (6th Cir. 1990); *Hard v. Burlington N. Ry. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

A new trial is ***not*** warranted where the movant fails to present evidence that a juror's conduct affected the outcome at trial. In *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995), for example, the Court of

Appeals affirmed the denial of a new trial where a juror's relative observed proceedings the jury did not, holding that previous instructions not to discuss the case with outsiders was a sufficient remedy. Similarly, in *United States v. Johnson*, 308 Fed.Appx. 968, 973 (6th Cir. 2009), where a juror brought baking soda into the jury room to show other jurors what 2 ounces of drugs looked like, the Court of Appeals determined the district court properly remedied any misconduct by instructing the jury to consider only the evidence presented at trial.

Even more instructive, in *United States v. Wheaton*, 517 F.3d 350, 361 (6th Cir. 2008), the Sixth Circuit reviewed a request for new trial where a juror used a computer to access information about the distance between two towns discussed during the trial. 51 F.3d at 361. When the juror's actions were brought to the attention of the district court, it instructed jurors not to rely on outside evidence. *Id.* The court affirmed a denial of the motion for new trial, stating the request for a new trial must fail because the litigant had "not demonstrated that any prejudice resulted from the misconduct." *Id.* at 361.

a. The Courts Below Properly Denied an Evidentiary Hearing

An evidentiary hearing is not warranted every time a party claims extraneous information reached the jurors. "A hearing is required only when there is a colorable claim of extraneous information that presents a likelihood of affecting the verdict." *Gonzales*, 227 F.3d at 527 (internal quotations omitted). As the district court indicated, "to be entitled to an evidentiary hearing ... the party seeking

the hearing must allege specific conduct by a juror that resulted in undue influence." (R. 62, p. 5 (*citing Marks*, 895 F.2d at 1131)). Unless the submitted affidavits ***on their face*** show the outcome would have been different, no evidentiary hearing is required. *Hard*, 870 F.2d at 1461.

Here, the district court properly investigated Petitioner's allegations of misconduct through detailed considerations of the affidavits provided. (R. 62, pp. 3-4, 8). But those affidavits lacked any evidence Juror #4 provided information about the attorneys to other jurors or allowed it to affect his vote during deliberations. (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.) Thus, Petitioner failed to establish any connection between the attorneys' background and the final verdict in this case. *Price*, 200 F.3d at 1255 (to grant a motion for new trial, a "direct and rational connection" must exist between the information presented by the juror and the jury's conclusion). *See also Gonzales*, 227 F.3d at 527 (declining to order an evidentiary hearing based on the foreman's alleged statement that "defense counsel always represents guilty clients," holding it did not present a likelihood of affecting the verdict). Here, the Court of Appeals correctly affirmed the district court's denial for new trial.[8]

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[8] When reviewing the denial of a motion for a new trial, the Court of Appeals properly viewed the evidence in the light most favorable to Respondent, the nonmoving party. *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004). Further, all credibility issues were required to be viewed in a light most favorable to the jury verdict. *Wheaton*, 517 F.3d at 365. The Court of Appeals could reverse the district court only if it found an abuse of discretion. *Id.*, at 361 (the trial judge is in the best

b. An Evidentiary Hearing Was Unnecessary

Petitioner contends that an evidentiary hearing was necessary to determine: (1) what Juror #4 read on the internet; (2) whether he read the Court's opinion in Petitioner's previous appeal; and (3) whether he shared any information he reviewed with other jurors.[9] (Petitioner's Brief, p. 18). As the district court correctly noted, the affidavits submitted already established these issues, and no additional hearing was necessary.

Petitioner attorney's affidavit indicated exactly what Juror #4 allegedly reviewed. He read about the attorneys' "background, education and areas of practice." (R. 48. Motion for New Trial, Ex. 1, Martin Aff., ¶¶ 3-4). Jurors #2 and #5 agreed that Juror #4 only stated that he read about the ***attorneys***, not about the case. (R. 48, Rodriguez's Motion for New Trial, Ex. 2, Juror #2 Aff., ¶ 3; R. 50, Juror #5 Aff., ¶ 3). Neither juror indicated Juror #4 said anything specific about what he read. *Id.* Furthermore, Juror #5 was one of the people who accompanied Juror #4 to lunch before deliberations, and all he indicated was that "Juror #4 told us that he went on the Internet and read all about the attorneys in the case." *Id.*

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position to assess the alleged misconduct and appropriate remedies).

[9] There is no evidence whatsoever to support Petitioner's contention that "[a] hearing would have established that [Juror #4] used the extraneous information to deny Petitioner a fair trial." Pet. Brf. p. 3.

Petitioner's counsel interviewed these jurors and prepared their affidavits. If the jurors had any additional information to add, they certainly would have included it. Thus, from the affidavits, it already was clear: (1) Juror #4 read background information about the lawyers only; (2) therefore, he did not read the earlier opinion about the case; and (3) the specifics about what he purportedly read were not shared with other jurors. There was and is no need for additional inquiry.

c. Petitioner's Arguments Are Mere Speculation

Petitioner was obliged to offer more than a "serious suspicion" of juror bias. *Johnson*, 308 Fed.Appx. at 973. The law required him to demonstrate how juror misconduct prejudiced his case. Contrary to Petitioner's argument, such "prejudice will not be presumed." *Id.* (*citing United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1996); *United States v. Gillespie*, 61 F.3d 457, 460 (6th Cir. 1995); *see also*, *McCoy*, 652 F.2d at 659 n.9 (indicating allegations must be "non-conjectural").

Petitioner has provided *no* evidence Juror #4 prejudiced the outcome of this case. No juror raised any suggestion of undue influence or misconduct before the close of trial – including Juror #2 who voted in Petitioner's favor.[10] (R. 48, Rodriguez's Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.).

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[10] *Munafo*, 381 F.3d at 107-108 (district judge was justified in according juror affidavits "little weight" because the affiant-jurors did not speak up when they had an opportunity before the judge and the affidavits were prepared "with the assistance of counsel").

Petitioner only presumes Juror #4 was biased against him and wildly speculates about what the juror "must have read." Such conjecture is insufficient to invalidate the verdict. (R. 62, p. 7; *Wheaton*, 517 F.3d at 361-362) (rejecting speculation that a juror might have used his computer to review defendant's criminal history and holding no new trial was required where defendant failed to show any real prejudice).

d. The Information Allegedly Reviewed Did Not Relate to the Case and Was Harmless

During his closing, Petitioner's attorney intentionally discussed his former UAW membership in front of the jury. (R. 68, Trial Trans. Vol. 5A, pp. 21:25-22:2). He also spent part of his rebuttal during closing discussing defense counsel and attorneys with "big law firms." (Resp. Appx. 12b-22b; R. 68, Trial Trans. Vol. 5A, pp. 58:9-59:2). Thus, Juror #4's alleged conduct was harmless given that Petitioner's own counsel already provided the jury with similar background information about the attorneys. Moreover, the district court's instructions as to evidence, personal knowledge, and comments by the lawyers, were sufficient to remedy any alleged irregularity. *See Johnson*, 308 Fed.Appx. at 973 (any danger the jury might consider evidence which had not been admitted at trial was ameliorated by cautionary instructions); *Copeland*, 51 F.3d at 613-614)(same).

3. Petitioner Should Not Be Rewarded By Obtaining Juror Affidavits Through Improper Means

The district court rightly noted that, "***in accessing Rule 606(b) affidavits, courts should also***

examine the circumstances under which the affidavits were obtained." (R. 62, p. 5 (emphasis added)). "The Supreme Court has long adhered to the general rule that a juror is incompetent to impeach his or her verdict." *Gonzales*, 227 F.3d at 523 (*citing Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892)). The policy considerations for this rule are obvious. If verdicts could be attacked by the testimony of those who rendered them, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). To protect jurors and the sanctity of their verdicts, the law places limits on post-verdict questioning. *United States v. Rakes*, 169 F.2d 739, 746 (4th Cir. 1948) (searching or pointed juror examinations on behalf of a party is to be emphatically condemned); *Simmons First Nat'l Bank v. Ford Motor Co.*, 88 F.R.D. 344, 347 (E.D. Ark. 1980) (a party engages in post-verdict questioning of jurors without the court's involvement at its own peril). In particular, Fed R. Evid. 606(b), prohibits most juror inquiries, stating in relevant part:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. ... A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The district court identified at least three factors that must be met before a party may properly engage in post-verdict juror questioning. The party must: (1) have reasonable grounds to do so; (2) provide advance notice to opposing counsel and the court; and (3) confine questioning to areas expressly circumscribed in Fed. R. Evid. 606(b). *Id.*, pp. 5-8 (*citing Simmons*, 88 F.R.D. at 347-348; *Rakes*, 169 F.2d at 745-746; *Stephens v. City of Dayton*, 474 F.2d 997 (6th Cir. 1973). Such factors were not met in the case.

As discussed above, federal courts have a long history of holding jury deliberations inviolate. To preserve our system of justice, and protect jurors from needless harassment that would greatly reduce their willingness to serve, juror contact must be extremely limited and conducted under court supervision. If conduct engaged in by Petitioner's counsel is permitted to form the basis for review by this Court, it will eviscerate Fed. R. Evid. 606(b) and open the floodgates of post-trial jury tampering.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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Dated: May 19, 2011

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 23, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 1A

Monday, June 23, 2008

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

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Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 238
Detroit, Michigan 48226
(313) 962-1234

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* * *

[p.55]

just as an individual would be treated.

In this case the plaintiff claims that the defendant failed to promote him or that the defendant was motivated for discriminatory reason in failing to promote him.

I've given you some instructions on the elements of the case that need to be established by the plaintiff to make his case, and I'll give you more detailed

instructions at end of the case on those elements of proof. Those instructions will control your deliberations and your decision in the case.

Now a few words about conduct as jurors.

First, I instruct you that during the case you should not discuss the matter with anyone or permit anybody to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you ought not talk about the case.

Secondly, do not read or listen to anything about the case in any way. If someone tries to talk to you about the case, bring it to the Court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own, and finally, you ought not form any opinions about the outcome of the case until after you heard all of the evidence. Keep an open

[p.56]

mind until you start your deliberations at the end of the case.

If you want to take notes during course of the trial, you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time, and to observe the body language, the nonverbal communication that tells you more about the witnesses response than the verbatim response. If you are talking notes, you should make

sure it doesn't interfere with your listening to and considering all of the evidence.

Also, if you do take notes, you should not discuss them with anyone else before you begin your deliberations, and you will leave your notes with us at the end of the day in the jury room, and then they will be available to you to consider during course of your deliberations.

If you choose not to take notes, remember that it is your own individual responsibility to listen to the evidence, and we depend on the judgment of all members of the jury. You all must remember the evidence in the case.

The trial is going begin now with each side making an opening statement. An opening statement is not evidence and it is not argument. It is suppose to be an outline of what the party intends to prove to help you follow evidence as received during the course of the

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 25, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 3A

Wednesday, June 25, 2008

– – –

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

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on your W-2 that you earn $42,081.12, is that correct?

A. Yes.

Q. For 2002 you earned $42,567.16, is that correct?

A. Yes.

Q. And 2003 the year you left around July 30th, you had earn up to that point $16,333.04, is that correct?

A. Yes.

Q. And also you received some worker's compensation?

A. Yes, it would not be on there.

Q. Which I believe was approximately $6,000?

MS. BRODEUR: Is that a question or testimony Mr. Martin?

MR. MARTIN: You provided me with documents that indicated the amount of worker's comp that he received as part of the one of the exhibits. You can cross examination if you want to dispute.

MS. BRODEUR: Sure.

MR. MARTIN: You believe it is $6,000 in worker's comp?

A. I have no idea. I'm thinking it is.

BY MR. MARTIN

Q. Okay. Now I'm handing you has Defense Exhibit Number 17.

THE COURT: Are you asking for Number 1 to be

* * *

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Q. You heard him say sometimes he was in charge of Illinois, Indiana and part --

A. I knew he came to Detroit, and I knew he was from Indiana.

Q. And you never submitted an application to any other facility?

A. No.

Q. E-mails, hey I'm interested in being a supervisor?

A. No.

Q. If I understand you, it is your contention that because you checked off a box in the LAC saying that you wanted to relocate, that entitled you to a job somewhere else in the United States?

A. No.

Q. Would you agree with me as a general proposition, that if you received that supervisor job awarded to Walter Adams in 2002, you would have a received salary of $45,000?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Did you learn that now -- or were you aware when working in the Romulus facility?

A. They told me about how much it would be.

Q. And I see in Plaintiff's Exhibit Number 1, for

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instance, in 2001 you made close 42,100?

A. Yes.

Q. And would you agree with me, would you not, had you been given the supervisory job in that year, the amount of what supervisor made was 45,000 less the 42,081 that you earned?

A. Yes.

Q. So you were looking at approximately almost 3,000 for that year?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And to go on the same thing, you agree that in 2002 you made 42,567?

A. Yes.

Q. The different is 2,500 bucks?

A. Yes.

Q. And that is the same logic for 2003?

A. Yes.

Q. If you do the math, that is your salary for seven months?

A. Yes, because of worker's comp.

Q. Sure. You have to add that in?

A. Yes.

Q. Speaking of worker's comp, let make the record more

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 27, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 5A

Friday, June 27, 2008

– – –

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

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in here. What's the problem? They say he didn't say anything about discrimination. Can you believe that? Why would he deny it when he gave him this letter? You have to ask yourself, if they are willing to come in here and lie under oath, what would they do about discrimination?

After the telephone conversation Mr. Rodriguez said I'm out of here. You know, now you want to hear. Now you want to hear. Yeah, because here comes a lawsuit. I'm out of here. I told my wife I'm out of here. I told my family who I am yelling at for no reason I'm out of here. That's it. I'm taking a chance.

What are the damages in this case? If you believe Jose Rodriguez's case and disbelieve the defendant's testimony on the stand -- fortunately I didn't have to prove that they lied. One of their own witnesses, John Ravenelle and Sammy Reid, he said he just heard about this case on Friday. Ravenelle knows it was November O3 when we got the lawsuit. You have to think that's big.

You've given up time from your family to try to do justice. You want to make sure that you make the right decision. That's the beauty of this country. It puts justice in your hands. If you believe the plaintiff's case and you find for the plaintiff, then the Judge will instruct you on economic damages. The law says economic damages, if you found that it should be given, the job

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that Spinney was given, if you think that, you start at 2001, deduct $42,081 from what Spinney was paid. There is a list that shows about 45,000 -- 45, 46,000 -- deduct the difference. Those are economic damages in 02 before Mr. Adams was hired. If you believe that McKibbon should have hired Jose, he didn't know nothing about program, never received the package, and if he had, we know he would have done it. We watched this man. This is a man going to work on crutches at 4:00 in the morning. Then you find out what -- what did he earn as a truck driver in 02, 42,500, and what did Mr. Adams eventually earned when he got hired, which was 45,000, you add that difference, and the third year, which is 03, where they hired -- 03 they hired someone else again, whose application is here, and we can't cross examine him to see what's true and not true. You don't know, but if you find those three years those are economic damages, that is all you can award on economic side.

But this case is not just about economic damages. This case is about the pain of discrimination, the pain of discrimination like someone die in the family. You may be in pain for that, for years. In this case Jose Rodriguez, you heard him testify, will live with this pain for the rest of his life, rest of his life. He even told you that with his children, I don't Spanish. I took that language

* * *

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Mr. Adkinson. They have done nothing wrong. Rather than encourage this type of lawsuit again, you need to tell my client FedEx that they did the right thing and promoted the right person for this job, plain and simple.

Thank you.

THE COURT: All right. Thank you.

Mr. Martin, your rebuttal?

MR. MARTIN: Thank you, your Honor.

You know a lots of big corporations, they have a lot of resources Ford, General Motors, Chrysler, FedEx. They have a lot of resources when they throw that resource at any big law firm and say defend us. Even if we have done wrong, defend us because somebody wins. We don't want the other people to start suing. Defend us, and those lawyers in the big law firms, they go to the EEOC job right out of law school to get started so you can go to the big law firm if you want big money, and if you want to represent people. You don't do it just because you want to work for the EEOC.

Look, you heard all the time that lawyers take either case. That's how you are trained in law school. Represent either side. That's your job, and if you decide I want to go to a big law firm, you've got to do -- you have to defend them, which means you have to defend a Sammy Reid who looks you in the face and lied. You have

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to defend him. You have to defend John Ravenelle who said the meeting never happened with Rodriguez.

Now she relied -- sister counsel relied on Scrimenti for all the good things that she wanted to say. Scrimenti said Adkinson was a good guy. So if Scrimenti was believable, then she has to -- when she said John Ravenelle and Jose did meet and Jose, she didn't say didn't talk or walk away. She stood by her statement. It was specific. She said Jose told him -- she says if, in fact, she knew Jose had been offered the supervisory position look, I was denied this position because --

MS. BRODEUR: Objection. That is a fact not in evidence.

MR. MARTIN: Your Honor, she testified -- she testified -- it's in the affidavit. She relied upon the statement, and again, I could stand up and objected to the many false representations that counsel made, but I did not. We rely on the jury to recall the facts.

THE COURT: Go ahead.

MR. MARTIN: Thank you, your Honor.

She was specific. She said they met and a discussion took place, and Jose said, hey, this guy was denied a job because of his accent. That is what was heard. Jose didn't say -- Jose could have lied and said that -- talk about lies -- Jose could have said John

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Adkinson (sic) came up and said, I'm not giving you this job because you're Hispanic. Jose was free to do that, just like Sammy Reid was free to lie to you, and he did. Jose didn't. John Ravenelle is free to lie to you, and he did. Jose didn't. He could have said Mr. Adkinson said no Hispanic. No Hispanic. He could have said that easily, but he did not.

He testified look, I came and started talking about a supervisor job in June 02 when Mr. Adams' job was at issue. So that was a small misstatement. They told whoppers. You got the downhill and the whoppers. That's what they came with and did, and they did it for a reason. Jose didn't do it to try to win the case. They did it because they may lose the case. All pulled all the recourses they could to make sure. Everything you've seen, the people in court, they weren't witnesses. They were lawyers, counsel.

MS. BRODEUR: I object. I have no idea who was in the gallery.

MR. MARTIN: We had all the witnesses sequestered.

THE COURT: Sustain that objection. Disregard the comment.

MR. MARTIN: That's why, ladies and gentlemen of the jury, we fought so hard to get the letter in

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because we knew it would be tough with their resources, and I will tell you that the LAC is a bridge to nowhere for certain people, and the bridge to nowhere didn't give him a package.

Ms. Robinson said even if on a computer, you've got to get the package sent for the training. What good is the training if you don't have the package? Okay. I got on the job training. That is what Jose was thinking. No school for LAC. The school for the LAC is at the workplace, right at the workplace. He said he thought the supervisor would okay it and send a report in saying he is doing fine. He is doing this.

Again, you have to ask yourself, it is not like Jose cannot read or write, he doesn't make sense. You have to ask yourself, it doesn't make sense, but using LAC as a shield in this case, don't buy it. You must realize this LAC -- all this thing about LAC is after Jose -- all the names they mention is after Jose. Why is that? Because when Jose left, we got LAC to get people promoted. Here we have Breitwiser three, four months after Jose. That's good. Got one, but where are all the other people if it is not the bridge to nowhere?

The company looks to keep control. We want to do what they want to do when they feel like doing it, and discriminate. They want to discriminate female, African

[p.62]

Americans, Hispanic, disable or age when they want to do it. How do you get that freedom? Not having

anything written down. Most corporations have a policy right there. FedEx is a big corporation, big company. You tell me they can't put it in writing? When people don't want something in writing, there is a reason. What is it? The postings.

Ms. Brodeur talks about can't consider Jose for any other positions outside. You can put his name down. I'll go anywhere, and you can consider him for 16 positions under Mr. Adkinson.

MS. BRODEUR: Objection.

MR. MARTIN: Sixteen service centers where jobs were available. It is their duty to say, you know what? I am interested. We didn't have anything in 16 places especially since we don't post. They told you. We don't post. Why? Why not post so everyone can know? Because you want to control. There is a supervisor, somebody's nephew. You control big corporations, like control as far as Mr. Adams.

What did he tell you talking about a supervisor's job? Counsel wants you to believe it was his supervisory experience and transportation. Let's put it together. Jose drove all of that time, big trucks. He did that, and he had leadership skills in that area. He knows all the

[p.63]

routes, all the things. That is supervisory skills in transportation. One plus one equals two, and Mr. Adams told you -- you remember I asked him, if you worked your way up from a dock worker? No, worked cars to a supervisor at UPS, a competitor without LAC,

without anything. Just what did he say? Hard work, hard work and knowing the job. It makes sense. As I said, it is not rocket scientist.

Think about it. Someone leaves. You can step in if you want to. Mr. Adams said after a supervisor, that's more training, additional training.

THE COURT: You have five minutes.

MR. MARTIN: It was after -- it was after Ms. Brodeur became a lawyer -- she first worked hard and how she got additional training. We are talking about a supervisor over a worker who drives a truck that he's driven. Obviously that wasn't that important for LAC. They've been around since the 1950's. They've been around. They've been growing with supervisors that had never been to LAC. So we know it is not like going to nursing school or nurses where you have to have that. It's not, and this is why you have to look at their defense in this case.

Was there a lie? Everybody lies because we got to protect ourselves now, and as far as Mr. Adkinson, he

[p.64]

rehired him. Yeah, to be a driver. To be a driver. Oh, yeah. I want you back to be a driver. Just drive trucks. That's it.

We use to have kids working the mines before the union. These are things they will do if you don't stop them, children in mines. You can do this, this and this. No female, you're African American, even white male too many or too less. Can't go over here.

As the Judge said, I have a couple of more minutes. Ms. Brodeur is right. This case is about credibility. All of this stuff can be so confusing. It's about credibility. Did mr. Reid tell you the truth, or did he lie? Did Mr. Ravenelle tell you the truth, or did he lie, lie to your face? It is one thing to lie to your face outside, but when you take the oath in a federal court in front of a judge, and you are searching for the truth, you want to be fair. You want to do the right thing, and then you lie and say, I heard about this case on Friday from Ms. Brodeur.

Thank God we have a jury. Thank God you have that power to right a wrong. She's right, your verdict is important to FedEx. You decide for Mr. Rodriguez. You're saying, you need to change the way you do things. That is not right. It's not right how you treat people. It is not right do the things that you do. It is not right, and

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we are not going to stand for it.

Mr. Rodriguez has helped a lot of people since that happened to him. Look at the people that's been -- completed the LAC. They have cleaned it up. They do it right. We have Rodriguez. We know it is coming here. We need to do it right. He has done something to other people, the same people who passed. They have given them a supervisor job.

You can't give him that. Do justice. You can give him justice for the rest of his life that he will suffer knowing that he was denied something because of something, because of something he couldn't help.

Thank you so much.

– – –